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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KIM, MIN-SOK, Individually and as Personal Representative, etc., et al., Plaintiffs and Appellants, v. JOHN H. KIM et al., Defendants and Appellants.	No. B164800 (Los Angeles County Super. Ct. No. BC275859)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Affirmed.

Law Office of Richard E. Brown and Richard E. Brown; Herrmann Law Firm and Kathryn Herrmann; Charlotte E. Costan for Plaintiffs and Appellants.

Fulbright & Jaworski, John A. O'Malley, Martin L. Pitha, and James Wetwiska for Defendants and Appellants John H. Kim, Jeffrey W. Steidley, Michael T. Gallagher, Jerry M. Young, J. Craig Lewis, and Daniel M. Downey.

Law Offices of John A. Schlaff and John A. Schlaff for Defendant and Appellant Hartley Hampton.

This is an appeal from an order granting motions to quash service of summons for lack of personal jurisdiction and dismissing this action against some of the lawyers sued herein for malpractice and fraud. Appellants at all times have been residents of Korea. Respondents at all times have been residents of Texas. On behalf of appellants, respondent John H. Kim (Kim) filed a wrongful death lawsuit in federal court in Los Angeles (the underlying action), where there was pending multi-district litigation arising from the 1997 Korean Air Lines crash in Guam that caused the death of appellants' decedent. Kim associated with respondent Jerry M. Young (Young), who was granted permission to appear in the underlying action *pro hac vice*. The other respondents are Texas attorneys who practiced law with Kim and/or Young but were not involved in the underlying action. Appellants' claims in this action arise from the dismissal of the underlying action without any recovery in favor of appellants.

Appellants entered into a retainer agreement with Kim in Korea that included a forum selection clause providing that any suit arising from the lawyer-client relationship would be brought in federal court in the Southern District of Texas. Appellants had no contacts with any of the respondents except Kim. Except for Kim and Young, none of the respondents represented appellants or had any involvement in the Korean Airlines multi-district litigation of which the underlying action was a part. Respondent Jeffrey W. Steidley (Steidley), who shared office space with Kim, permitted his name to appear on the retainer agreement between Kim and appellants. Although his firm, The Steidley Law Firm, was identified as an "associated independent law firm," the letterhead of the retainer agreement created the impression that appellants' representation was undertaken by the "Steidley Kim" law firm. The other respondents, Michael T. Gallagher (Gallagher), J. Craig Lewis (Lewis), and Hartley Hampton (Hampton) were listed in court filings in the underlying action as partners or associates of Young.[1]

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[1] During the pendency of the appeal, Hampton and appellants reached a settlement agreement, and hence, Hampton is no longer a party to this appeal.

The trial court found that the underlying action was filed in federal court by foreign residents, that appellants had entered into a retainer agreement with Kim that included a forum selection clause providing that Texas would have jurisdiction of any dispute arising from the representation of appellants, and that Kim and Young, the only respondents who appeared in the underlying action, were entitled to enforce the forum selection clause. As to the other respondent lawyers, the trial court found no evidence that any of them appeared in court, or attended depositions in California, or had any other contact with California, apart from Kim having put their names on briefs or other filings in California federal court. The court concluded that, without evidence that any of these lawyers ever so much as signed a pleading filed in a California court, the mere listing of their names as counsel of record was insufficient evidence of the minimum contacts necessary to warrant jurisdiction.[2] The court also reasoned that, if appellants were correct that all the respondent lawyers were members of an actual or ostensible law firm with joint liability for the wrongdoing of Kim and Young, then they were also entitled to assert the forum selection clause in the contract that gave rise to their liability.[3]

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[2] Appellants incorrectly argue that the sole bases for the trial court's ruling were that the underlying action was filed in federal court by foreign residents and the Kim retainer agreement provided for Texas jurisdiction, the grounds set forth in the minute order. The court stated additional grounds for its ruling during oral argument. "You have cited no physical appearance by any of these lawyers in a courtroom in California. I don't see that any of these lawyers appeared and argued the case -- or were here for depositions or had any other contact with California, other than Mr. Kim apparently having put their names on a brief or briefs before the federal court. I don't know of any case that indicates that that would be a sufficient minimum contact. If the lawyers had even signed a pleading or given notice of a motion -- excuse me -- given notice of a decision or noticed a motion or put their name -- signed their name on anything that happened in federal court, I think you would have a stronger case. [¶] . . . [¶] Mr. Kim and Mr. Young are bound by Mr. Kim's retainer agreement indicating that jurisdiction is in Texas, and the other people have not appeared."

[3] The trial court observed, "Mr. Kim and Mr. Kim's client signed an agreement indicating that jurisdiction was in Texas. And to the extent I should think that other lawyers' names are on the brief and are vicariously liable for Mr. Kim, it's because there is some relationship. If there is the relationship in the nature of a law firm or an

Appellants contend the trial court erred as a matter of law in granting the motions to quash because all respondents availed themselves of the benefits of California as a consequence of being in association or partnership with Kim and Young, who appeared in California federal court to prosecute the underlying action in the hope of profiting from the representation. Respondents have cross-appealed, not challenging the trial court's order of dismissal but only contending that the trial court abused its discretion in overruling their objections to appellants' evidence in opposition to the motions to quash. We find no abuse of discretion and affirm the order granting the motions to quash.

DISCUSSION

Standard of Review

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10.) "A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate '"traditional notions of fair play and substantial justice."' (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 . . . .)" (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444 (*Vons*).)

Conversely, "each individual has a liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful minimum 'contacts, ties or relations.' (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471-472 . . . .) As a matter of fairness, a defendant should not be 'haled into a jurisdiction solely as the result of "random," "fortuitous," or "attenuated" contacts.' (*Burger King, supra,* 471 U.S. at p. 475 . . . .)" (*Vons*, *supra*, 14 Cal.4th at p. 445.)

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ostensible firm between Mr. Kim and all the other lawyers whom you have sued in this case, it would by extension seem obvious that those lawyers are also protected by the same contract that Mr. Kim signed."

"Personal jurisdiction may be either general or specific." (*Vons, supra*, 14 Cal.4th at p. 445.) General jurisdiction exists if the nonresident defendant has substantial, systematic, and continuous contacts in the forum. In the absence of such general jurisdiction, specific jurisdiction over the nonresident defendant nonetheless is proper if the nonresident defendant purposely availed himself of the benefits or privileges of California; deliberately engaged in significant activities within California; or created continuing obligations between himself and California residents. (*Id*. at pp. 445-446.)

Appellants contend that California courts may properly assert specific jurisdiction over respondents in this action. "[T]he appropriate inquiry is whether the plaintiff's cause of action 'arises out of or has a substantial connection with a business relationship defendant has purposefully established with California.'" (*Vons, supra,* 14 Cal.4th at p. 448, quoting *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 149.) "In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. . . . The crucial inquiry [thus] concerns the character of defendant's activity in the forum, whether the cause of action *arises out of or has a substantial connection* with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. [Citation.]" (*Vons,* at p. 448, original italics.)

Plaintiffs have the burden of establishing by a preponderance of the evidence that jurisdiction is proper. If that burden is satisfied, the burden shifts to the defendant "to demonstrate that the exercise of jurisdiction would be unreasonable. [Citation.] When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence. [Citation.] When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record. [Citation.]" (See *Vons, supra*, 14 Cal.4th at p. 449.)

Appellants contend the jurisdictional facts are not in conflict, and this court need not defer to any findings of the trial court. So far as Kim and Young are concerned, appellants are correct, but we conclude the exercise of jurisdiction over Kim and Young would be unreasonable because the parties agreed to litigate in Texas, and in fact, appellants are now pursuing their malpractice, fraud and related claims in Texas district court. Kim offered evidence that there was a Texas forum selection clause in the retainer agreement between him and appellants. Appellants argued that provision was adhesive and unenforceable, but they offered no evidence whatsoever to support their argument that the retainer agreement was an adhesion contract.

Appellants offered the declaration of Ju, Jeon Choel, one of the appellants here, who testified that he first met with Kim in November 1997 to discuss the possibility of retaining him in the underlying action. The meeting was in Korea, and Kim arranged for a Korean-speaking agent to interpret their communications. The retainer agreement was presented to appellants in both English and Korean. Appellants did not retain Kim until several months later, in July 1998, after they had had several meetings with Kim and the interpreter in Korea. Appellants argue there is no evidence that the forum selection clause was explained to them or was bargained for. Nonetheless, appellants were free to choose the lawyer who would represent them and the terms of the engagement, and the record is simply devoid of any fact from which it might be inferred that the retainer agreement or the forum selection clause was adhesive or otherwise unenforceable.

Young is the only respondent other than Kim who represented appellants in the underlying action.[4] Kim was authorized to associate Young in the matter by the express terms of the retainer agreement. The retainer agreement had a dispute resolution clause that provided in pertinent part, "Any suit between client and Attorneys or either of them

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[4] There is no evidence of what Young did in the underlying action, other than apply to appear *pro hac vice*. In his declaration, he stated that he worked "under the direction of John Kim in a lawsuit handled by Mr. Kim." Young had no contact with appellants, and he had no interest in the outcome of the underlying action or in Kim's law practice.

regarding Attorney's representation of Client or regarding anything covered by this agreement will be filed in Federal Court, Southern District of Texas." The retainer agreement defines "Attorneys" to include Kim and an Australian law firm that is not a party to this appeal, and does not mention Young. But the forum selection clause is not limited to disputes that arise from appellants' representation by Kim and the Australian firm. It broadly encompasses disputes between appellants and Kim regarding "anything covered by this agreement." This clause is broad enough to encompass appellants' claims arising from Young's work performed under Kim's supervision.[5]

Thus, even though appellants demonstrated that Kim and Young had sufficient contacts in California to warrant specific jurisdiction over them, we conclude that it would be unreasonable for California rather than Texas to provide a forum for the resolution of appellants' claims. Appellants did not offer any evidence suggesting that it would be unreasonable or unjust to prosecute their malpractice action in Texas. Moreover, although appellants failed to mention it in their opening brief, we have taken judicial notice, at respondents' request, that in August 2003, appellants filed an action in Texas asserting the same malpractice and fraud claims against almost all respondents here. Demonstrably, it is neither unreasonable nor infeasible for appellants to proceed with their claims in Texas. California has an insufficient interest in this lawsuit to interfere with the prosecution of the case in Texas, which has a strong interest in cases alleging malpractice and fraud by Texas attorneys.

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[5] Appellant's reliance on *Bancomer, S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450 for the proposition that a nonsignatory to a contract may not enforce the contractual forum selection clause is misplaced. *Bancomer* acknowledged that in some cases, a nonsignatory may enforce a forum selection clause. In *Bancomer*, however, the court found the nonsignatory was neither an intended third party beneficiary of the contract nor closely related to the contracting parties and that the dispute fell outside the scope of the clause in any event. (*Id.* at pp. 1458-1462.) Moreover, the court concluded that enforcement of the forum selection clause would result in arbitrary and conflicting rulings. (*Id.* at p. 1462.) Here, we find the parties intended that claims against Young would fall within the forum selection clause, and none of the other circumstances in *Bancomer* is present.

Turning to the other respondents, there were significant factual disputes over whether they were law partners or associates of Kim and/or Young and whether they undertook to represent appellants and appeared as counsel of record in the underlying action. Appellants named but never served any of the law firms in this action, and the trial court correctly distinguished between the potential *liability* of any law firm partner or associate of Kim or Young and the assertion of California *jurisdiction* over individual lawyers. The trial court found there was no evidence that Steidley, Gallagher, Lewis, Downey, or Hartley did anything in California in relation to the underlying action, and we review that finding for an abuse of discretion. The court's finding will not be disturbed on appeal unless we conclude the trial court exceeded the bounds of reason. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

We find substantial evidence supported the trial court's findings that Steidley, Gallagher, Lewis, Downey, and Hartley did not engage in any activities in California in relation to the underlying action. They each submitted declarations in support of their motions to quash in which they testified that they had no residence or place of business in California; they were residents of Texas; they were not licensed to practice law in California; they have never had any communications with appellants; they did not represent appellants in the underlying action; and they never personally appeared in the underlying action or had any interest in it.

In opposition, appellants offered evidence of federal court records in the underlying action demonstrating that in Young's application to appear *pro hac vice,* he stated that he was "associated with the law firm of Gallagher, Young, Lewis, Hampton, Downey & Kim." Appellants also offered evidence that the federal court docket sheets listed appellants' attorneys of record as Kim and Young, of the firm Gallagher, Young, Lewis, Hampton, Downey and Kim.[6]

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[6] The cross appeals challenge the trial court's evidentiary rulings, overruling their objections to evidence the appellants offered in opposition to the motions to quash. The trial court did not abuse its discretion in admitting these records from the federal court action into evidence. The court also did not abuse its discretion in overruling

The trial court did not abuse its discretion in finding in the face of this disputed evidence that the only lawyers who appeared in California or otherwise represented appellants were Kim and Young. Appellants did not carry their burden of proving that their causes of action against Steidley, Gallagher, Lewis, Downey, and Hartley arose out of any act done or transaction they consummated in California, or that any of these respondents purposefully availed himself of the privilege of conducting activities in California.

Notwithstanding appellants' arguments to the contrary, under California law, vicarious liability based on either the theory that these respondents were de facto partners or agents of Kim and/or Young does not establish specific jurisdiction over them. Appellants cite inapposite California authorities for the incorrect proposition that jurisdiction over a partnership confers jurisdiction over the individual attorneys. Some of the cases appellants cite do not involve jurisdiction at all but rather an entirely different principle, such as the principle that each partner is liable for everything chargeable to the partnership. (See, e.g., *Blackmon v. Hale* (1970) 1 Cal.3d 548, 556-559.) Whether or not any respondent here is liable for appellants' injury is unrelated to the question of specific jurisdiction in a California court to try the liability issues.

Under California law, appellants have the burden to prove that *each and every respondent, individually,* directly or indirectly sought to gain from California dealings, based on an analysis of appellants' relationships with each respondent. (See, e.g., *Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 661 ["The purported partnership relationship . . . is insufficient [to establish a connection with California] because jurisdiction over each defendant must be established individually"]; *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 904-905 ["[J]urisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners"]; *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 233 ["[F]or purposes of assuming personal

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respondents' objections to appellants' verified complaint and the declaration of Ju, Jeon Cheol.

jurisdiction, the purposes of other parties in the particular transaction cannot be imputed to the defendant seeking to quash service"].)

Appellants rely on other cases involving personal jurisdiction, but none of the cited cases holds that jurisdiction over a partnership, without more, confers jurisdiction over individual attorneys. To the contrary, courts thoroughly analyze the unique facts of each case to decide if each defendant had sufficient contacts with California to render the exercise of jurisdiction fair and reasonable. (See, e.g., *Vons, supra*, 14 Cal.4th 434 [specific jurisdiction proper over out-of-state restaurant franchisees whose franchiser was a California corporation, where the franchise agreements were signed in California and had California choice of law and forum selection clauses, the franchisees' officers attended training and other meetings in California, the franchisees bought goods in California and received invoices from and made payments in California]; *Simons v. Steverson* (2001) 88 Cal.App.4th 693 [specific jurisdiction proper over out-of-state law firm that employed attorney licensed to practice in California who undertook representation of California residents in California business transactions involving other California residents governed by California law]; *Brown v. Watson* (1989) 207 Cal.App.3d 1306 [specific jurisdiction warranted over Texas attorneys who telephoned and corresponded extensively with California lawyers who retained them and with California clients, and whose negligence damaged California residents].)

Appellants also mischaracterize *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, as establishing that "under some circumstances, phone calls and letters are sufficient to establish minimum contacts." *Birbrower* did not decide or even consider any jurisdictional issue. Rather, the *Birbrower* court concluded that a lawyer who is not licensed in California, whether or not the lawyer is physically present in California, engages in the unauthorized practice of law "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means." (*Id.* at pp. 128-129.) The *Birbrower* opinion is not even instructive here, where there is no evidence that

Young, Steidley, Gallagher, Lewis, Downey, or Hartley communicated with appellants *at all*, neither in person nor by telephone, fax, computer, or by any means.

DISPOSITION

The order granting the motions to quash and dismissing this action against respondents is affirmed. Respondents and cross-appellants shall recover their costs on appeal.

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GRIMES, J.*

We concur:

EPSTEIN, P.J.

HASTINGS, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.